ESPL (M) SDN BHD

v.

RADIO & GENERAL ENGINEERING SDN BHD

COURT OF APPEAL, PUTRAJAYA
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
MOHD GHAZALI YUSOFF JCA
[CIVIL APPEAL NO: W-02-206-2002]
9 SEPTEMBER 2004

CIVIL PROCEDURE: *Injunction - Interlocutory mandatory injunction, appeal against refusal of - Injunction sought by defendant to compel plaintiff to continue paying monies received for construction works into bank account - Whether monies in account were held by plaintiff on trust in favour of defendant - Whether defendant entitled to relief sought to protect its proprietary interest therein - Whether learned judge erred in refusing relief on ground that monies were unascertainable by reason of set-off claimed by plaintiff*

CIVIL PROCEDURE: *Injunction - Interlocutory mandatory injunction - Principles governing grant of mandatory injunction - Whether applicable*

EQUITY: *Equitable remedies and reliefs - Injunction - Injunction sought by defendant to compel plaintiff to continue paying monies received for construction works into bank account - Whether relationship between parties was that of a trust to entitle defendant to injunctive relief*

TRUSTS: *Trusts - Requirements of a trust - Whether satisfied - Whether bank account set up for payment of construction works created a relationship of trustee and beneficiary between parties concerned*

This was an appeal by the defendant against the refusal of a mandatory injunction sought by the defendant. The defendant was the sub-sub contractor of a building project in respect of mechanical works appointed by the plaintiff sub-contractor who in turn was appointed by the main contractor, one Henz Construction ('Henz') of the project concerned. The value of the sub-sub contract between the plaintiff and the defendant in respect of the mechanical works was about RM85 million. Disputes arose between the instant parties about the quality of the defendant's works and the plaintiff proceeded to remedy the alleged defective work and claim set

off from payments due to the defendant as contractually agreed. An issue arose between the parties as to whether the plaintiff should continue to pay monies received from Henz into the bank account set up for payment for mechanical works done. The plaintiff took the position that it was not obliged to do so by reason of its asserted set-off and filed a writ claiming a sum of about RM33 million against the defendant. The defendant counter claimed for a mandatory order requiring the plaintiff to pay all monies received from Henz into a separate account held by stakeholders pending the trial of the action. The learned judge denied the relief sought by the defendant on the ground that the monies were unascertainable by reason of the set off claimed by the plaintiff. Hence the defendant's appeal. The primary issue was whether a trust was created in favour of the defendant entitling the defendant for the relief sought.

Held (allowing the appeal)
Per Gopal Sri Ram JCA delivering the judgment of the court:

[1] The language of cl. 27.1 of the sub-contract between the plaintiff and Henz (which applied *mutatis mutandis* to the defendant) was very clear. It stated that the "Sub-contractor will receive the payments made by the Contractor and will hold the right to receive such payments as a trust fund …". Those were imperative words. Where parties to a transaction use imperative words, they must be taken to have intended to create the relationship of trustee and beneficiary. Further, the contemporaneous correspondence and the surrounding circumstances of the case clearly showed that the plaintiff intended to be a trustee for the defendant. Therefore, there was an intention to create a trust. The extent of the defendant's beneficial interest was also sufficiently certain in that the defendant was entitled to its share of the monies in the account after any set-off claimed by the plaintiff was adjudicated upon in the usual way through arbitration. The fact that the plaintiff alleged that it was entitled to a set-off did not absolve it of its duty to pay into the account all the monies received from Henz. The act of the plaintiff in diverting those monies away from the account amounted to a serious breach of trust.

It followed that the defendant had established the existence of a trust and therefore had a proprietary right to the monies receivable by the plaintiff from Henz. It was therefore entitled to the equitable relief from the court to protect that proprietary interest. (pp 684 f-g, 686 a, 690 e-h & 691 a)

[2] It is a principle of general application in a Court of Equity that specific relief will not be granted where monetary compensation is a sufficient remedy. However, as an exception, once an equitable proprietary title under a trust is established, equity presumes that monetary compensation is inadequate and will grant specific relief, even if the subject matter of the trust consists of pure personalty or a promise to create a trust. (p 697 c)

[3] The learned judge took a rather over simplistic approach of the case before him. He erred in finding that since the amount of money that was due after the set-off claimed by the plaintiff was uncertain he could not grant the injunctive relief sought. However, the nature of the obligation should be looked into and not the final figure after accounting for any asserted set-off. The plaintiff was beyond doubt under an obligation to pay into the account all monies it received from Henz. That obligation was enforceable in equity as a trust. The fact that it might have a mere contractual right of a set off against the defendant made no dent in the cast iron armour of the trust imposed upon the plaintiff's conscience. That was a monetary claim that must await adjudication by the court. Therefore, applying settled law, there was simply no reason why a mandatory injunction should not be granted. (pp 697 e-f & 698 d)

*[**Bahasa Malaysia** Translation Of Headnotes*

Ini adalah rayuan defendan terhadap penolakan injunksi mandatori yang dipohon defendan. Defendan merupakan kontraktor orang bawahan kepada plaintif kontraktor sesuatu projek bangunan berkenaan kerja-kerja mekanikal. Plaintif pula merupakan kontraktor orang bawahan kepada kontraktor utama projek tersebut yang dipanggil Henz Construction ('Henz'). Nilai kontrak di antara plaintif dengan defendan berkenaan kerja-kerja mekanikal adalah RM85 juta. Pertikaian timbul di antara plaintif dengan defendan terhadap kualiti kerja-kerja defendan dan plaintif meneruskan remedi untuk memperbaiki kerja yang tidak memuaskan tersebut dan menuntut tolakan daripada pembayaran kepada defendan sepertimana yang dipersetujui secara kontrak. Isu timbul di antara pihak-

pihak tersebut sama ada plaintif sepatutnya meneruskan untuk membayar wang yang diterima daripada Henz ke dalam akaun bank yang didirikan untuk pembayaran bagi kerja-kerja mekanikal defendan. Plaintif berpendapat ia tidak diwajibkan berbuat demikian disebabkan dakwaan tolakan tersebut dan memfailkan writ menuntut jumlah sebanyak RM33 juta terhadap defendan. Defendan pula memfailkan tuntutan balas untuk perintah mandatori yang mewajibkan plaintif membayar semua wang yang diterima oleh Henz ke dalam satu akaun asing yang dipegang oleh pemegang-pemegang (stakeholders) sambil menunggu perbicaraan tindakan plaintif tersebut. Hakim yang arif menolak relif yang dipohon defendan atas alasan bahawa jumlah wang tersebut tidak boleh ditentukan disebabkan tolakan yang dituntut plaintif. Maka rayuan defendan ini. Isu utama adalah sama ada satu amanah wujud memihak kepada defendan membolehkan defendan berhak kepada relif yang dipohon.

Diputuskan (membenarkan rayuan)
Oleh Gopal Sri Ram HMR menyampaikan penghakiman mahkamah:

[1] Bahasa klausa 27.1 kontrak di antara plaintif dengan Henz (yang terpakai *mutatis mutandis* kepada defendan) adalah jelas. Ia menyatakan bahawa kontaktor bawahan akan menerima pembayaran daripada kontraktor utama dan akan memegang hak untuk menerimanya sebagai wang amanah. Perkataan-perkataan tersebut mustahak. Apabila pihak-pihak kepada sesuatu transaksi menggunakan perkataan-perkataan mustahak, mereka mesti diambil sebagai bertujuan untuk mewujudkan hubungan pemegang amanah dan benefisiari. Lagi, surat-menyurat yang ada dan keadaan sekeliling kes jelasnya menunjukkan bahawa plaintif bertujuan menjadi pemegang amanah kepada defendan. Dengan itu terdapatnya niat untuk mewujudkan satu amanah. Tahap kepentingan benefisial defendan juga boleh ditentukan secukupnya disebabkan defendan berhak kepada bahagian jumlah wangnya selepas apa-apa tolakan yang dituntut plaintif diadjudikasi secara biasa melalui timbangtara. Fakta bahawa plaintif mendakwa ia berhak kepada sesuatu tolakan tidak melepaskannya daripada kewajiban untuk membayar ke dalam akaun tersebut semua jumlah wang yang diterimanya daripada Henz. Tindakan plaintif melencongkan jumlah wang berkenaan daripada akaun tersebut merupakan satu pecah amanah yang serius. Berikutannya defendan telah membuktikan kewujudan satu amanah dan dengan itu mempunyai hak milik kepada wang yang diterima oleh plaintif daripada defendan. Maka, defendan berhak untuk relif ekuiti dari mahkamah untuk melindungi kepentingan hak miliknya tersebut.

[2] Suatu prinsip aplikasi umum mahkamah ekuiti adalah relif spesifik tidak akan diberikan jika pampasan wang merupakan remedi yang mencukupi. Tetapi sebagai satu kekecualian apabila hakmilik ekuiti di bawah satu amanah dibuktikan, ekuiti menganggapkan bahawa pampasan wang tidak akan mencukupi dan akan memberi relif spesifik yang dipohon walaupun perkara amanah tersebut merupakan *personalty* sahaja atau hanya merupakan suatu janji untuk mewujudkan satu amanah.

[3] Hakim yang arif telah mengambil pendekatan yang ringkas terhadap kes ini. Beliau tersalah mendapati bahawa disebabkan jumlah wang yang wajar selepas tolakan yang dituntut oleh plaintif tidak dapat ditentukan, beliau tidak boleh memberikan relif injunksi yang dipohon. Tetapi, sifat kewajiban sepatutnya diberikan perhatian dan bukan jumlah akhir selepas kiraan apa-apa dakwaan tolakan. Tidak diragui bahawa plaintif berkewajiban membayar ke dalam akaun semua wang yang diterima daripada Henz. Kewajiban tersebut boleh dikuatkuasakan di bawah ekuiti sebagai satu amanah. Fakta bahawa ia mungkin mempunyai hak kontraktual tolakan tersebut tidak memberi apa-apa kesan sama sekali ke atas amanah yang dikenakan ke atas plaintif. Itu adalah tuntutan wang yang mesti menunggu adjudikasi mahkamah. Maka dengan memakai undang-undang yang ditetapkan, tiada sebabnya injunksi mandatori tidak boleh diberikan.

Case(s) referred to:

Banque Belge v. Hambrouck [1921] 1 KB 321 ***(refd)***

BSNC Leasing Sdn Bhd v. Sabah Shipyard [2000] 2 CLJ 197 CA ***(refd)***

Cayne v. Global Natural Resources Plc [1984] 1 All ER 245 ***(refd)***

Concorde Construction Ltd v. Colgan Co Ltd (No 1) [1984] 1 HKC 241 ***(refd)***

Dubai Almunium Ltd v. Salaam [2002] UKHL 48 ***(refd)***

Fletcher v. Fletcher [1844] 67 ER 594 ***(refd)***

Films Rover International Ltd & Ors v. Cannon Film Sales Ltd [1986] 3 All ER 772 ***(refd)***

Foskett v. McKeown [2000] 3 All ER 97 ***(refd)***

Gah Cheng Hooi v. Equipment Dynamics [1991] 1 464; [1991] 1 CLJ (Rep) 133 SC ***(refd)***

Hameeda Bee v. Mrs P Seenivasagam [1950] MLJ 267 ***(refd)***

Hunter v. Moss [1994] 1 WLR 452 ***(refd)***
Keet Gerald v. Mohd Noor Abdullah & Ors [1995] 1 CLJ 293 CA ***(foll)***
Knight v. Knight [1840] 49 ER 68 ***(refd)***
Lipkin Gorman v. Karpnale [1991] 2 AC 548 ***(refd)***
MCPhail v. Doulton [1971] AC 424 ***(refd)***
Newacres Sdn Bhd v. Sri Alam Sdn Bhd [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321 SC ***(refd)***
NWL Ltd v. Woods [1979] 3 All ER 614 ***(refd)***
Paragon Finance plc v. DB Thakerar & Co (a firm) [1999] 1 All ER 400 ***(refd)***
Po Kin & Anor v. Po Shein AIR [1926] PC 77 ***(refd)***
Re Kayford Ltd [1975] 1 All ER 604 ***(refd)***
Royal Brunei Airlines Sdn Bhd v. Tan [1995] 2 AC 378 ***(refd)***
Singapore Press Holdings Ltd v. Brown Noel Trading Pte Ltd [1994] 3 SLR 151 ***(refd)***
Thomas M Heysek & Anor v. Boyden World Corp [1989] 1 MLJ 219 ***(refd)***
Timbermaster Timber Complex (Sabah) Sdn Bhd v. Top Origin Sdn Bhd [2002] 1 CLJ 566 CA ***(refd)***
Zainal Abidin Hj Abdul Rahman v. Century Hotel Sdn Bhd [1982] 1 MLJ 260 ***(refd)***

Other source(s) referred to:
Lewin on Trusts, 17th edn, p 74, para 4-12
Snell on Equity, 30th edn, p 114

For the appellant - WSE Davidson (Lim Chong Fong & Wong Hin Loong); M/s Azman Davidson & Co
For the respondent - Mohd Firuz Jaffril (Badrul Kamal); M/s Firuz Jaffril & Co

Reported by Usha Thiagarajah

JUDGMENT

Gopal Sri Ram JCA:

This appeal is directed against the refusal of a mandatory injunction sought by the defendant (the appellant here) from the High Court at Kuala Lumpur. The facts so far as this appeal is concerned are not in dispute. They have been neatly summarised by Mr. Davidson of counsel for the defendant. We are grateful to him.

Suria KLCC is a well-known and popular shopping centre in Kuala Lumpur. It is located in the podium block of the world's tallest pair of buildings called the Twin Towers. The dispute here concerns so much of the building contract of that podium block as relates to the mechanical works carried out there.

Amalan Kreatif Sdn Bhd is the project employer for the podium. It engaged Henz Construction ("Henz") as the main contractor for the whole project. Henz appointed the plaintiff (the respondent here) as the sub-contractor for the electrical and mechanical works. The plaintiff in turn appointed Econoler Singapore Pte Ltd as the sub-sub-contractor for those works. That sub-sub-contract was later novated to the defendant and consists, as most building contracts do, of several documents, including an agreement contained in the plaintiff's letter to the defendant dated 12 March 1996. In that agreement, the plaintiff and defendant agreed to open a bank account in the plaintiff's name to be jointly operated by "one of each of an equal number of signatories authorised by" the plaintiff and the defendant. It was also agreed that "all monies and payments received in respect of the ACMV Works (that is to say, the mechanical works which is the focus point of the dispute here) will be deposited into the bank account and subsequently disbursed in the mutually agreed manner set out in the attached Appendix D". That Appendix reads as follows:

> R&G shall open a Current Account with Bank of Commerce, Main Branch, to be designated as 'The Radio & General Trading Co Sdn Bhd:
>
> KLCC Account No. 1', which will be referred to herein after as the 'Joint Bank Account'.
>
> The Joint Bank Account will be jointly operated by one each of an equal number of signatories authorised by R&G and ESPL respectively. R&G shall irrevocably instruct the bank that any amendments to the conditions of operating the Joint Bank Account must be endorsed by the authorised signatories as set out above.

For completeness we add that the value of the sub-sub-contract between the plaintiff and defendant only in respect of the mechanical works is in the region of RM85 million.

There is also an Appendix E to the agreement in question. It reads:

> a. SPIRIT OF THE JOINT VENTURE (JV)
>
> i. It was initially intended that both companies, The Radio & General Trading Sdn Bhd (R&G) and Econoler Singapore Pte Ltd (ESPL) shall tender for the proposed Kuala Lumpur City Centre – Retail Podium Development as equal partners whereby both companies shall carry equal responsibilities.

ii. As ESPL does not have a registered Company in Malaysia for the time being, it is agreed that R&G shall operate as the 'Up-Front' Organisation for this proposed project (ie: The tender and subsequently should the subcontract be awarded, it shall be entered in the name of R&G).

b. WORKING MECHANISM

i. The Subcontract Agreement shall be entered into between R&G and HENZ, and subsequently an Agreement shall be entered into between R&G and ESPL.

ii. R&G shall perform the Electrical Services and be responsible & accountable for their Profit and Loss.

iii. Econoler Singapore Pte Ltd shall perform the Mechanical Services (ie: Air Conditioning & Mechanical Ventilation Services – ACMV) and be responsible for their Profit and Loss.

c. RELATIONSHIP

R&G and ESPL shall execute the project on equal standing.

Incorporated into the sub-sub-contract between the instant parties is the sub-contract between the plaintiff and Henz. That sub-contract has provisions for set-off in respect of defective works, including the circumstances in which that right is to arise as well as a comprehensive methodology and procedure by which the right of set-off is to be exercised. By incorporation, all those provisions apply *mutatis mutandis inter se* the plaintiff and defendant. Also to be found in the sub-contract is a cl. 27.1 which reads as follows:

> 27.1 Sub.-Contractor will receive the payments made by Contractor and will hold the right to receive such payments as a trust fund to be applied first to the payment of labourers, suppliers, Sub-Sub-Contractors and others responsible for the Work justifying such payments, and all taxes and insurance applicable thereto; and Sub-Contractor will so apply the payments from Contractor.

After the execution of the sub-sub-contract, the plaintiff opened a separate bank account known as Account No. l and informed Henz of the requirement that payments in respect of mechanical works were to be made in favour of that account. Later, disputes arose between the plaintiff and defendant about the quality of the defendant's work. The plaintiff then invoked the default clause (cl. 34(ii)) and proceeded to remedy the alleged defective work. It did not, as it was entitled to do, under cl. 34(iii) of the

sub-contract, proceed to terminate the sub-subcontract. An issue then arose between the parties as to whether it was mandatory for the plaintiff to continue to pay monies received from Henz into Account No. 1. The plaintiff took the position that it was not obliged to do so by reason of its asserted set-off. It then filed a writ claiming (after amendment to its statement of claim) a sum in the region of RM33 million. Later, the defendant (which delivered a counterclaim) moved the High Court for an order, pending the trial of the action, which in essence required the plaintiff to pay all monies received by it into a separate account to be held by stakeholders. The High Court declined relief solely on the ground that the monies were unascertained or unascertainable by reason of the set-off claimed by the plaintiff. The present appeal is, as we have already said, directed against that decision.

It must be said at once that to succeed in the interlocutory relief it has sought, it is necessary for the defendant to establish that it was the beneficiary under an express or constructive trust in its favour in respect of the monies received by the plaintiff under its sub-contract with Henz. Mr Davidson argued that his client would be entitled to the mandatory orders sought for in this case based on the plaintiff's breach of contract to pay the monies into Account No. 1. We are unable to agree. It is entrenched law that in the absence of a duly constituted trust or a specifically enforceable agreement to constitute a trust, an order of court directing the setting aside of a fund may be attacked on the ground that it is void for undue preference. There are a number of cases in point. But we will only refer to one.

In *Zainal Abidin bin Haji Abdul Rahman v. Century Hotel Sdn Bhd* [1982] 1 MLJ 260, Raja Azlan Shah CJ (Malaya) said:

> In other words, the danger envisaged is that if the hotel building is sold the proceeds thereof will simply disappear in discharging its liabilities and any surplus will go to Paremba Berhad. In our opinion the disappearance which the appellant fears in this case of the proceeds of sale does not come within the concept of disposing of assets with the intention or with the effect of defeating a claim. *If an injunction were to be granted in this case it would be entirely ineffective to benefit the appellant, because* the money would be held for the benefit of creditors generally, or *the result would be that a plaintiff could require a defendant to set up a special fund to meet a claim not yet proved, or again the effect might be to give the particular plaintiff preference over the other creditors.* (emphasis added.)

So the true question in this case is whether there is a duly constituted trust in the defendant's favour. Basing himself on the documentary and circumstantial evidence, Mr. Davidson submits that there is a trust. Mr. Firuz of counsel for the plaintiff in response makes two arguments. First, cl. 27.1 is a promise made by the plaintiff to Henz. The defendant is not a party to that promise. The defendant's claim to the benefit of the promise contained in cl. 27.1 is therefore defeated by the simple defence of privity. Second, if at all there is a trust in this case, then it is discretionary in nature. Because, of the phrase "justifying such payments" in cl. 27.1, it is necessary for the defendant to prove that it is entitled to payment before an obligation in the nature of a trust can arise.

Taking the first submission, the obvious answer – missed by counsel for the plaintiff – is that the device of a trust is an exception to the privity doctrine. That there can be a trust of the benefit of a contract is too well settled. See, *Fletcher v. Fletcher* [1844] 67 ER 594. In *Lewin on Trusts,* 17th edn, p. 74, para. 4-12, the learned authors express the following view, supported by high authority:

> ... the mere fact that the performance of a contract would benefit a person not a party to it will not automatically entitle him to enforce it; and, whatever the statutory inroads upon the principle may be, it was formerly clearly established that the law knew 'nothing of a *jus quaesitum tertio* arising by way of contract'. Such a third party, however, even if not within one of the statutory exceptions to this rule, might be able to establish that the promisee entered into the contract as trustee for him. If this can be established, the trustee can sue on the contract and will be able to recover damages in full, even though he personally has suffered no damage; 'or, if the trustee is recalcitrant, the beneficiary can sue in his own name, joining the trustee as a defendant. It makes no difference that the contract is under seal.' Even the benefit of a contract which is personal in nature, and which is expressed to be non-assignable, can be held on trust, unless the contract specifically prohibits such a trust from arising in addition to prohibiting any assignment.

Snell on Equity, 30th edn, a work entitled to much respect, states as follows at p. 114:

> In one respect, indeed, the equitable rights conferred by agreements relating to trusts are narrower than the rights at common law: an agreement to create a trust under seal but unsupported by valuable consideration will not be enforced by a court of equity. In other respects the equitable rights are wider: they afford the more efficacious remedies, especially of specific

> performance and of account, and they also may be invoked by *cestuis que trust* who are not parties to the trust. **Thus a trustee is liable in equity to the *cestuis que* trust for a breach of trust and not merely to the settlor for a breach of contract.** Again, an agreement to create a trust, in consideration of marriage is enforceable not merely by those providing the consideration but also by the issue of the marriage. (emphasis added.)

Accordingly, in the present instance, if there is found to be a trust created by the language employed by the plaintiff and Henz in the contract between them, it is open to the defendant to enforce that obligation in its capacity of *cestui que trust*. If there is an equitable obligation by way of a trust to create and maintain a corpus, it is no answer for the plaintiff to say that that is purely a matter between it and Henz and that Henz may sue the plaintiff for breach of contract if the plaintiff breaches its obligation. In those circumstances, the plaintiff owes a duty in equity to the defendant to create and maintain the corpus established by the Henz contract. And it is open then for the defendant to sue the plaintiff to compel it to fulfil its obligation. No question of privity arises because of the proprietary nature of the claim. For, at the end of the day, the beneficial ownership in the trust property – here it is the benefit of cl. 27.1 – vests in the *cestui que trust* and, in accordance with ancient principle, the owner of property may sue to enforce his rights in respect of his property. So much for the first submission.

That brings us to the paramount question within the first point. Was there an intention on the part of Henz and the plaintiff to create a trust for the defendant? Mr Davidson submitted that there was such intention. Having given the matter our utmost consideration, we are convinced that he is right. The language of cl. 27.1 is very clear. Look at the words the clause employs. It says "sub-contractor will receive the payments made by contractor and will hold the right to receive such payments as a trust fund ..." These are imperative words. They are not mere words of hope, desire, confidence or entreaty, ie, they are not precatory words. It is settled that no particular form of words are necessary to create an express trust. But where, as here, parties to a transaction use imperative words, they must be taken to have intended to create the relationship of trustee and beneficiary.

That brings us to the second submission. With respect, the plaintiff's argument overlooks the distinction between its duty as trustee to create and maintain the trust fund and with the right of the defendant to make a claim against that fund. The former is an equitable obligation. But the plaintiff's duty to pay out of the trust fund, we agree, does not arise until the defendant establishes its claim in the suit before the High Court. The difference between these two concepts is well brought out in the speech of Lord Wilberforce in *McPhail v. Doulton* [1971] AC 424. There is therefore nothing in the second submission.

There is one other point. In his written outline of submission, learned counsel for the plaintiff has argued that it is for the defendant to prove beyond a reasonable doubt that a trust exists. In support he relies on the decision of the Court of Appeal of the Federated Malay States in *Hameeda Bee v. Mrs. P Seenivasagam* [1950] MLJ 267. The actual ratio of that case is accurately summed up in the headnote of the report, namely, "that clear and unequivocal language must be used to establish a trust". However, in his brief judgment Pretheroe Ag CJ, quoted the following passage from the judgment of Viscount Cave LC in *Po Kin & Anor v. Po Shein* AIR [1926] PC 77:

> But on the other side there are also some most important facts. To begin with, and this no doubt is the most important of all, all this property stood in the name of the deceased; and on some of the documents it is stated that the deceased (apparently the deceased in person) paid the money. Of course the burden is on the appellant to displace the natural inference to be drawn from that fact. The burden is no doubt a difficult one to discharge, because in all these benamidar transactions the very object of the parties is secrecy; but still the person who alleges that property conveyed to another belongs to him must prove his allegation and prove it beyond reasonable doubt.

It is apparent from that passage that the learned Lord Chancellor was merely referring to a set of circumstances where a plaintiff claims to be the true owner of property registered in the name of the defendant and apparently paid for by the defendant. In our judgment, that passage has no relevance whatsoever to the facts of the present instance. Further, we do not think by the phrase "beyond reasonable doubt" the Lord Chancellor was imposing the criminal standard of proof in those circumstances. He was merely emphasising the high degree of proof demanded by the circumstances postulated by him.

In the present appeal, having regard to the clear and express words of cl. 27.1 and the contemporaneous correspondence and the surrounding circumstances of the case, the plaintiff clearly intended to constitute itself a trustee for the defendant. The elaborate measures of setting up a separate account and informing Henz are not explainable on any other probable basis. That the evidence of surrounding circumstances is highly relevant and admissible to demonstrate an intention to create a trust is established by *Re Kayford Ltd* [1975] 1 All ER 604.

In that case, a company was carrying on a mail-order business. It received many orders in the course of its business. There were cases of full payment and some cases where only deposits were paid. The company was hopelessly insolvent. To protect the interest of the innocent purchasers the company sought the help of its accountants who suggested that all such monies received be placed into a "Customers Trust Deposit Account". The accountants' advice directed to the bank by the company as instructions was not carried out by the bank. The day after the company went into liquidation, the company's written instructions were received by the bank. The question arose as to whether the sums of money paid into the bank account were held on trust for those who had sent them or whether they formed part of the general assets of the company and therefore available to the creditors generally. Megarry J, one of the greatest Equity jurists of our time, after considering all the circumstantial evidence held a trust had been created even though no imperative words were used in any document. He said:

> Now there are clearly some loose ends in the case. Mr Kay, advised to establish a 'Customers' Trust Deposit Account', seems to have thought that it did not matter what the account was called so long as there was a separate account; and so the dormant deposit account suggested by the bank manager was used. The bank statement for this account is before me, and on the first page, for which the title is simply 'Deposit account Kayford Limited', nearly £ 26,000 is credited. The second and third pages have the words 'Customer Trust Deposit account' added after the previous title of the account; and Mr Joels's payment was made after these words had been added. Mr Kay also left matters resting on a telephone conversation with the bank manager until he wrote his letter of 12th December to the bank. That letter reads: 'We confirm our instructions regarding the opening of the Deposit account for customer deposits for new orders'; and he then makes some mention of other accounts with the bank. The letter goes on: 'Please ensure the Re-opened Deposit account is titled "Customer Trust

Deposit account'". Then he gives the reference number and asks for confirmation that this has been done. Nevertheless, despite the loose ends, when I take as a whole the affidavits of Mr Wainwright, Mr Kay and Mr Hall (the bank manager) I feel no doubt that the intention was that there should be a trust. There are no formal difficulties. The property concerned is pure personality, and so writing, though desirable, is not an essential. There is no doubt about the so-called 'three certainties' of a trust. The subject-matter to be held on trust is clear, and so are the beneficial interests therein, as well as the beneficiaries. As for the requisite certainty of words, it is well settled that a trust can be created without using the words 'trust' or 'confidence' or the like: the question is whether in substance a sufficient intention to create a trust has been manifested.

In *Re Nanwa Gold Mines Ltd* [1955] 3 All ER 219, the money was sent on the faith of a promise to keep it in a separate account, but there is nothing in that case or in any other authority that I know of to suggest that this is essential. I feel no doubt that here a trust was created. From the outset the advice (which was accepted) was to establish a trust account at the bank. The whole purpose of what was done was to ensure that the moneys remained in the beneficial ownership of those who sent them, and a trust is the obvious means of achieving this. No doubt the general rule is that if you send money to a company for goods which are not delivered, you are merely a creditor of the company unless a trust has been created. The sender may create a trust by using appropriate words when he sends the money (though I wonder how many do this, even if they are equity lawyers), or the company may do it by taking suitable steps on or before receiving the money. If either is done, the obligations in respect of the money are transformed from contract to property, from debt to trust. Payment into a separate bank account is a useful (though by no means conclusive) indication of an intention to create a trust, but of course there is nothing to prevent the company from binding itself by a trust even if there are no effective banking arrangements.

In our judgment, *Re Kayford Ltd* is merely another authority in a long line that illustrate the proposition that a person's intention is to be gathered from the totality of the particular circumstances of the case, including the words written or spoken and the conduct of the parties.

Re Kayford Ltd was applied by our Supreme Court in *Geh Cheng Hooi v. Equipment Dynamics* [1991] 1 CLJ 464; [1991] 1 CLJ (Rep) 133 where Gunn Chit Tuan SCJ (later Chief Justice of Malaya) said:

> Although we would agree with the view that a trust should not normally be imported into a commercial relationship, yet we would hold that in cases such as those involved in these appeals the court could and should consider the facts to determine whether a fiduciary relationship existed. We therefore agreed with Mr Wong that in the present cases *we must consider the circumstances concerning the relationship between the parties. We were satisfied and agreed with the learned judge that in the circumstances of these cases a trust can be implied even where the agreements themselves do not contain an express clause that the proceeds of sale would be held on trust,* as it is clearly manifested in the agreements and the correspondence concerned that it was the intention of the parties that the Emporium or its outlets as licensors should, after deduction of the fees and commissions agreed to be paid to them, make over to the concessionaires or consignors all payments by third party customers. (emphasis added.)

The importance of the passage above quoted is that in it the Supreme Court recognises the critical difference, often overlooked, between a mere fiduciary and a trustee. It is elementary that every trustee is a fiduciary; but every fiduciary is not a trustee. See, *Paragon Finance plc v. D B Thakerar & Co (a firm)* [1999] 1 All ER 400. The relationship of fiduciary is commonly, but quite incorrectly, associated with a liability to account in equity. It is not a case of a true trust. So, if an employee steals his employer's cash and spends it at the race track, he is liable to account to his employer as a fiduciary. But he is not a trustee of the stolen funds in the true sense. Again, if A dishonestly assists B to commit a breach of trust of C's property, A is not a trustee at all, although he is sometimes erroneously called a "constructive trustee". Because of his dishonesty A is liable to account to C. See, *Royal Brunei Airlines Sdn Bhd v. Tan* [1995] 2 AC 378. But he cannot in law be described as a trustee of C.

The distinction between the two separate and distinct concepts is brought home in the following passage in the speech of Lord Millett in *Dubai Almunium Ltd v. Salaam* [20021 UKHL 48:

> Referring to these cases in *Paragon Finance plc v. DB Thakerar & Co (a firm), Paragon Finance plc v. Thimbleby & Co (a firm)* [1999] 1 All ER 400 at 408-409 in the Court of Appeal, I drew attention to the fact, which was becoming increasingly overlooked, that the expressions 'constructive trust' and 'constructive trustee' were used by equity lawyers to describe two entirely different situations. One was the situation which the claimants unsuccessfully contended had arisen in *Mara v. Browne* [1896] 1 Ch 199. The other is the situation which arose in the present case.

Unlike HB in *Mara*'s case, Mr Amhurst did not assume the position of a trustee on behalf of others. He never had title to the trust funds or claimed the right to deal with them on behalf of those properly entitled to them. He acted throughout on his own or his confederates' behalf. The claim against him is simply that he participated in a fraud. Equity gives relief against fraud by making any person sufficiently implicated in the fraud accountable in equity. In such a case he is traditionally (and I have suggested unfortunately) described as a 'constructive trustee' and is said to be 'liable to account as a constructive trustee'. But he is not in fact a trustee at all, even though he may be liable to account as if he were. He never claims to assume the position of trustee on behalf of others, and he may be liable without ever receiving or handling the trust property. If he receives the trust property at all he receives it adversely to the claimant and by an unlawful transaction which is impugned by the claimant. He is not a fiduciary or subject to fiduciary obligations; and he could plead the Limitation Acts as a defence to the claim.

In this second class of case the expressions 'constructive trust' and 'constructive trustee' create a trap. As Jules Sher QC, sitting as a deputy judge of the Chancery Division, recently observed in *Coulthard v. Disco Mix Club Ltd* [1999] 2 All ER 457 at 479, [2000] 1 WLR 707 at 731 this 'type of ... trust is merely the creation by the court ... to meet the wrongdoing alleged: there is no real trust and usually no chance of a proprietary remedy'. The expressions are 'nothing more than a formula for equitable relief (see *Selangor United Rubber Estates Ltd v. Cradock (a bankrupt) (No 3)* [1968] 2 All ER 1073 at 1097, [1968] 1 WLR 1555 at 1582 per Ungoed-Thomas J). I think that we should now discard the words 'accountable as constructive trustee' in this context and substitute the words 'accountable in equity'.

The distinction between the two kinds of constructive trustee is of critical importance in the present context. If, as I think, it is still not within the ordinary scope of a solicitor's practice to act as a trustee of an express trust, it is obviously not within the scope of such a practice voluntarily to assume the obligations of a trustee and so incur liability as a *de facto* trustee or a constructive trustee of the first kind. But given that a solicitor may be guilty of deliberate and dishonest conduct while acting within the ordinary scope of his practice, there is no conceivable reason why his firm should not thereby incur vicarious liability for loss caused by the conduct which constituted him a constructive trustee of the second kind. Unfortunately Vinelott J applied *Mara v. Browne* [1896] 1 Ch 199 in *Re Bell's Indenture, Bell v. Hickley* [1980] 3 All ER 425, [1980] 1 WLR 1217, a case of dishonest assistance like the present, and held that the firm was not vicariously liable. The decision is inconsistent with *Brydges v. Branfill* [1841] 12 Sim 369, 59 ER 1160. In my opinion it was wrongly decided and we should overrule it.

We have spent considerable time on this topic because of Mr. Davidson's reliance on the relationship between his client (the defendant) and the plaintiff as joint venturers pursuant to Annexure E. It is learned counsel's argument that the expression of an intention for the relationship to be a joint venture points to a trust. With respect, we must enter our most vigorous dissent. Joint venturers, like partners, owe fiduciary duties to each other. (See, *Newacres Sdn Bhd v. Sri Alam Sdn Bhd* [1991] 3 CLJ 2781; [1991] 1 CLJ (Rep) 321.) But they are not trustees for each other in the true sense of that word. If one of them deals with the property belonging to the joint venture or the other joint venturer in a manner inconsistent with the fiduciary duty owed in the particular circumstances, that property may be followed at common law (see, *Lipkin Gorman v. Karpnale* [1991] 2 AC 548) or traced in equity (see, *Banque Beige v. Hambrouck* [1921] 1 KB 321; *Foskett v. McKeown* [2000] 3 All ER 97) into the hands of the ultimate recipient. Tracing in equity is made possible because of the proprietary right of the victim in the property, namely, his equitable title to the property in question. But that is a very long way from saying that a joint venturer is a trustee. He is not. On the present facts, the defendant has sufficient material in support of its case for a trust without having to resort to these other arguments.

Having established that there was an intention here to create a trust, it is now necessary to see if the other two requirements, namely, certainty of subject matter and of objects are present on the facts. Unless all three certainties are present there cannot be a trust. See, *Knight v. Knight* [1840] 49 ER 68.

So far as certainty of objects is concerned, there is no difficulty whatsoever here. The documents make it clear that it is the defendant who is the nominated beneficiary. As for certainty of subject-matter, again there is no difficulty. The trust attaches to all sums receivable by the plaintiff from Henz. These monies are payable by the plaintiff into Account No. 1. The corpus is therefore sufficiently certain. See, *Hunter v. Moss* [1994] 1 WLR 452. As for the extent of the defendant's beneficial interest, this too is sufficiently certain in the sense that the defendant is entitled to its share of the monies in Account No. 1 after any set-off claimed by the plaintiff is adjudicated upon in the usual way through arbitration. The fact that the plaintiff alleges that it is entitled to a set-off does not absolve it of its duty to pay into Account No. 1 all the monies received from Henz. In our judgment, the act of the plaintiff in diverting these monies away from Account No. 1 amounts to a serious breach of trust.

To summarise the points made thus far, the defendant has established the existence of a trust and therefore a proprietary right to the monies receivable by the plaintiff from Henz. It is therefore entitled to equitable relief from the court to protect that proprietary interest. That brings us to the nature of the remedy sought.

As already observed, what the defendant has sought is a mandatory injunction. The question arises: Is the grant of a mandatory injunction governed by principles different from those applicable to prohibitory injunctions? At one time, that was thought to be the case. No longer so.

In *Films Rover International Ltd and Others v. Cannon Film Sales Ltd* [1986] 3 All ER 772, Hoffmann J (as he then was) demolished the myth that there was any difference in the principles applicable to the grant of interlocutory mandatory and prohibitory injunctions. He said:

> In the forefront of his argument counsel for Thorn-EMI submitted that the court should not grant an interlocutory mandatory injunction, amounting to specific performance of one of Thorn-EMI's alleged contractual obligations, unless there appeared a high probability that Films Rover would succeed in establishing its legal right at the trial. In this case the Court of Appeal has gone no further than to say that Films Rover has an arguable case and, as I have already said, I propose to treat that as meaning that Films Rover is at least as likely to fail as to succeed. Counsel said that fell well short of the standard of persuasion necessary for the grant of an interlocutory mandatory injunction. In support of this proposition, counsel for Thorn-EMI relied in particular on the recent decision of the Court of Appeal in *Locabail International Finance Ltd v. Agroexport, The Sea Hawk* [1986] 1 All ER 901 at 906, [1986] 1 WLR 657 at 664 in which Mustill LJ (with whom Balcombe LJ agreed) approved the following passage from the judgment of Megarry J in *Shepherd Homes Ltd v. Sandham* [1970] 3 All ER 402 at 412, [1971] Ch 340 at 351:
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> > Third, on motion, as contrasted with the trial, the court is far more reluctant to grant a mandatory injunction than it would be to grant a comparable prohibitory injunction. In a normal case the court must, *inter alia*, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted and this is a higher standard than is required for a prohibitory injunction.
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> Mustill LJ went on to say that although this judgment pre-dated *American Cyanamid Co v. Ethicon Ltd* [1975] 1 All ER 504, [1975] AC 396 the statement of principle 'in relation to the very special case of the mandatory injunction' was not affected by what had been said in the House of Lords in that case.

I would respectfully agree that there is no inconsistency between the passage from Megarry J and what was said in the *Cyanamid* case. But I think it is important in this area to distinguish between fundamental principles and what are sometimes described as 'guidelines', ie, useful generalisations about the way to deal with the normal run of cases falling within a particular category. The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle. The passage quoted from Megarry J in *Shepherd Homes Ltd v. Sandham* [1970] 3 All ER 402 at 412, [1971] Ch 340 at 351 qualified as it was by the words 'in a normal case', was plainly intended as a guideline rather than an independent principle. It is another way of saying that the features which justify describing an injunction as 'mandatory' will usually also have the consequence of creating a greater risk of injustice if it is granted rather than withheld at the interlocutory stage unless the court feels a 'high degree of assurance' that the plaintiff would be able to establish his right at a trial. I have taken the liberty of reformulating the proposition in this way in order to bring out two points. The first is to show that semantic arguments over whether the injunction as formulated can properly be classified as mandatory or prohibitory are barren. The question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction. The second point is that in cases in which there can be no dispute about the use of the term 'mandatory' to describe the injunction, the same question of substance will determine whether the case is 'normal' and therefore within the guideline or 'exceptional' and therefore requiring special treatment. If it appears to the court that, exceptionally, the case is one in which withholding a mandatory interlocutory injunction would in fact carry a greater risk of injustice than granting it even though the court does not feel a 'high degree of assurance' about the plaintiff's chances of establishing his right, there cannot be any rational basis for withholding the injunction.

In *Shepherd Homes Ltd v. Sandham* Megarry J spelled out some of the reasons why mandatory injunctions generally carry a higher risk of injustice if granted at the interlocutory stage: they usually go further than the preservation of the *status quo* by requiring a party to take some new positive step or undo what he has done in the past an order requiring a party to take positive steps usually causes more waste of time and money

if it turns out to have been wrongly granted than an order which merely causes delay by restraining him from doing something which it appears at the trial he was entitled to do a mandatory order usually gives a party the whole of the relief which he claims in the writ and makes it unlikely that there will be a trial. One could add other reasons, such as that mandatory injunctions (whether interlocutory or final) are often difficult to formulate with sufficient precision to be enforceable. In addition to all these practical considerations, there is also what might be loosely called a 'due process' question. An order requiring someone to do something is usually perceived as a more intrusive exercise of the coercive power of the state than an order requiring him temporarily to refrain from action. The court is therefore more reluctant to make such an order against a party who has not had the protection of a full hearing at trial.

Megarry J recognised, however, that none of these was a necessary concomitant of a mandatory injunction. For example, there is sometimes a sense in which a mandatory injunction is needed to preserve the *status quo.*

In charterparty withdrawal cases the Commercial Court has frequently granted interlocutory injunctions restraining an owner from using the ship otherwise than in accordance with the terms of the charter (see per Lord Denning MR in *A/S, The Oakworth* [1975] 1 Lloyd's Rep 581). Although negative in form, these are (in the case of a time or voyage charter) mandatory in effect because they require the owner to continue to provide the ship. In these cases there is what might (at some risk of oxymoron) be called a 'dynamic *status quo*' which consists in the continuing use of the vessel on the charterer's business. Counsel for the plaintiffs also referred me to *Continental Grain Co v. Islamic Republic of Iran Shipping Lines and Government Trading Corp of Iran, The Iran Bohonar* [1983] 2 Lloyd's Rep 620, in which the Court of Appeal made a mandatory order requiring owners to direct their vessel to deviate to a safe port and discharge cargo to which the plaintiff claimed title. The order was made because the court considered that there was a serious question to be tried as to whether on the true construction of the Hague Rules the owners were under a contractual obligation to do so. Neither of the Lords Justices (nor for that matter counsel) seem to have suggested that such an order should not be made unless the court felt a high degree of assurance that the plaintiff's construction was right. On the contrary, Ackner LJ said ([1983] 2 Lloyd's Rep 620 at 623):

> Whether that argument will succeed or not is another matter. We have had the advantage of [the] submissions [of counsel for the defendants] and it would be churlish to say that they lack force, but speaking for myself I am satisfied that there is a serious question to be argued on this subject.

> I would venture to suggest that *The Iran Bohonar* was plainly a case in which, despite the mandatory character of the injunction, the risk of the injustice which would be caused by 'wrongly' withholding it was far greater than the risk of injustice if it turned out to have been wrongly granted. It is easy to construct other counterexamples by way of exception to the proposition that mandatory injunctions are more drastic and irreversible in effect and involve greater expense and inconvenience if wrongly granted than prohibitory injunctions. These considerations lead me to conclude that the Court of Appeal in *Locabail International Finance Ltd v. Agroexport* [1986] 1 All ER 901 at 906, [1986] 1 WLR 657 at 664 was not intending to 'fetter the court's discretion by laying down any rules which would have the effect of limiting the flexibility of the remedy', to quote Lord Diplock in the *Cyanamid* case [1975] 1 All ER 504 at 510, [1975] AC 396 at 407. Just as the Cyanamid guidelines for prohibitory injunctions which require a plaintiff to show no more than an arguable case recognise the existence of exceptions in which more is required (compare *Cayne v. Global Natural Resources plc* [1984] 1 All ER 225), so the guideline approved for mandatory injunctions in Locabail recognises that there may be cases in which less is sufficient. It is significant that both Mustill and Balcombe LJJ did not merely rely on the mandatory nature of the injunction. They went on to explain why in the particular circumstances of the case, the granting of the injunction would give rise to an unacceptable risk of injustice.

The views of Hoffmann J have been adopted and applied by our courts and also by the courts of Singapore. See, *Timbermaster Timber Complex (Sabah) Sdn Bhd v. Top Origin Sdn Bhd* [2002] 1 CLJ 566 (CA); *BSNC Leasing Sdn Bhd v. Sabah Shipyard* [2000] 2 CLJ 197 (CA); *Thomas M Heysek & Anor v. Boyden World Corp* [1989] 1 MLJ 219; *Singapore Press Holdings Ltd v. Brown Noel Trading Pte Ltd* [1994] 3 SLR 151 (CA).

It follows that the steps to be followed in an application for a mandatory injunction are the same as those in an application for a prohibitory injunction. Those steps were set out in the judgment of this court in *Keet Gerald v. Mohd Noor bin Abdullah & Ors* [1995] 1 CLJ 293 as follows:

> To summarize, a judge hearing an application for an interlocutory injunction should undertake an inquiry along the following lines:
>
> (1) he must ask himself whether the totality of the facts presented before him discloses a *bona fide* serious issue to be tried. He must, when considering this question, bear in mind that the pleadings and evidence are incomplete at that stage. Above all, he must refrain from making any determination on the merits of the claim or any defence to it. It is sufficient if he identifies with precision the issues raised on the

joinder and decides whether these are serious enough to merit a trial. If he finds, upon a consideration of all the relevant material before him, including submissions of counsel, that no serious question is disclosed, that is an end of the matter and the relief is refused. On the other hand if he does find that there are serious questions to be tried, he should move on to the next step of his inquiry;

(2) having found that an issue has been disclosed that requires further investigation, he must consider where the justice of the case lies. In making his assessment, he must take into account all relevant matters, including the practical realities of the case before him. He must weigh the harm that the injunction would produce by its grant against the harm that would result from its refusal. He is entitled to take into account, *inter alia*, the relative financial standing of the litigants before him. If after weighing all matters, he comes to the conclusion that the plaintiff would suffer greater injustice if relief is withheld, then he would be entitled to grant the injunction especially if he is satisfied that the plaintiff is in a financial position to meet his undertaking in damages. Similarly, if he concludes that the defendant would suffer the greater injustice by the grant of an injunction, he would be entitled to refuse relief. Of course, cases may arise where the injustice to the plaintiff is so manifest that the judge would be entitled to dispense with the usual undertaking as to damages (see *Cheng Hang Guan & Ors v. Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90). Apart from such cases, the judge is entitled to take into account the plaintiff's ability to meet his undertaking in damages should the suit fail, and, in appropriate cases, may require the plaintiff to secure his undertaking, for example, by providing a bank guarantee; and

(3) the judge must have in the forefront of his mind that the remedy that he is asked to administer is discretionary, intended to produce a just result for the period between the date of the application and the trial proper and intended to maintain the *status quo*, an expression explained by Lord Diplock in *Garden Cottage Foods Ltd v. Milk Marketing Board* [1984] AC 130; [1983] 2 All ER 770; [1983] 3 WLR 143 and applied in *Cheng Hang Guan*. It is a judicial discretion capable of correction on appeal. Accordingly, the judge would be entitled to take into account all discretionary considerations, such as delay in the making of the application or any adequate alternative remedy that would satisfy the plaintiff's equity, such as an award of monetary compensation in the event that he succeeds in establishing his claim at the trial. Any question going to the public interest may, and in appropriate cases should, be taken into account. A judge should briefly set out in his judgement the several factors that weighed in his mind when arriving at his conclusion.

Mr. Davidson argued that once the defendant had established a trust in its favour, it would be entitled to injunctive relief almost as of right. He relied on the decision in *Concorde Construction Ltd v. Colgan Co Ltd (No. 1)* [1984] 1 HKC 241. In that case, there was a cl. 30(4)(a) which read:

> The Employer's interest in any amounts so retained shall be fiduciary as trustee for the Main Contractor (but without obligation to invest), and the Main Contractor's beneficial interest therein shall be subject only to the right of the Employer to have recourse thereto from time to time for payment of any amount which he is entitled under the provisions of this Contract to deduct from any sum due or to become due to the Main Contractor.

Against the background of this clause, Rhind J said:

> According to the employer, the matters relied on by it in its defence and counterclaims are such as to give rise to a right of recourse for amounts which exceed the retention money. In particular, the amount the employer claims for defects would by itself come close to extinguishing the trust fund. I do not think that an employer is entitled to have recourse to the trust fund of retention monies simply on the strength of his own belief that he has a good claim which entitles him to such monies. The court cannot countenance a situation where the employer would, in effect, be the judge in his own cause and able to say when he would make deductions from the retention monies. Allowing the employer to free the retention monies from the trust whenever the employer claimed entitlement to a set-off would drive a coach and horses through the whole system of protection which condition 30(4)(a) seeks to set up.
>
> As a matter of common sense, the employer can only be permitted to deduct substantiated claims for liquidated amounts from the retention monies. How the employer will substantiate his claims depends on the circumstance. The best substantiation of all will be where the contractor admits that money is due to the employer. In those circumstances it is clearly right, that the employer should have immediate recourse to the trust money.

We would gratefully adopt these views. The only distinction between *Concorde Construction* and the present instance is that in that case the parties revealed their intention to create a trust quite expressly whereas here, the plaintiff's intention to create a trust is to be gathered from circumstantial evidence. But that is a distinction without a difference. In our judgment, if the employer in *Concorde Construction* could not act arbitrarily in violation of the terms of the trust, then, neither may the plaintiff here.

In a later passage Rhind J dealt with the availability of an injunction. He said:

> Injunctions are never granted as of right. That is elementary. However, as pointed out in *Redland Bricks Ltd v. Morris* [1970] AC 653 at 664, they are granted 'as of course' in certain familiar situations which keep recurring. In my view, an injunction should normally be granted 'as of course' to force an employer to set up a trust fund of retention monies where condition 30(4)(a) applies, and where there are no substantiated heads of deduction to which the employer is entitled to have resort.

We agree. It is a principle of general application in a Court of Equity that specific relief will not be granted where monetary compensation is a sufficient remedy. However, as an exception, once an equitable proprietary title under a trust is established, equity presumes that monetary compensation is inadequate and will grant specific relief, even if the subject matter of the trust consists of pure personalty or a promise to create a trust. The decision in *Fletcher v. Fletcher* [1844] 67 ER 564 amply exemplifies this approach.

In the present instance, the learned judge did not take the case before him through the various *Keet Gerald* steps. With much respect to him, he took a rather over simplistic approach. He merely said that since the amount of money that was due after the set-off claimed by the plaintiff was not certain he could not grant the injunctive relief sought. With respect we are unable to agree with this. As we have already said, what you have to look for in this case is the nature of the obligation and not the final figure after accounting for any asserted set-off. The plaintiff here was, beyond a doubt, under an obligation to pay into Account No. 1 all monies it received from Henz. That obligation was enforceable in Equity as a trust. The fact that it may have a mere contractual right of a set off against the defendant can make no dent in the cast iron armour of the trust imposed upon the plaintiff's conscience. That is a monetary claim that must await adjudication by the court.

It may appear from this judgment that the *Keet Gerald* line has been crossed by entering into the merits of the case to some extent. That is quite true. But there are good reasons for this.

We are here dealing with a mandatory injunction in terms in which it gives to the defendant at the interlocutory stage, the whole of the relief it claims under its counterclaim. So, once the mandatory injunction is granted, there is really no need for a trial on the issue of a trust. *Keet Gerald* was a case where the grant or refusal of an injunction at the interlocutory stage did not put an end to the action. The present is quite the opposite case. Hence, following *Cayne v. Global Natural Resources Plc* [1984] 1 All ER 245 and *NWL Ltd v. Woods* [1979] 3 All ER 614, it has become necessary to place a higher threshold in the defendant's path by requiring it to prove a case on merits before deciding whether the orders asked for should be granted.

To sum up, it is our respectful opinion that the defendant has established a trust in its favour in which the plaintiff had constituted itself as trustee. Applying settled law, there is simply no reason why a mandatory injunction should not be granted. The appeal would therefore be allowed. The orders made by the learned judge are hereby set aside. All that remains is to hear counsel on both sides as to the precise terms of the orders that should be made. The costs of the appeal and all costs incurred in the court below must be taxed and paid by the respondent (plaintiff) to the appellant (defendant). The deposit is refunded to the appellant (defendant).